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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 658

IN RE ESTATE OF HARRISON M. OVERMYER

PETITION FOR WRIT OF CERTIORARI

To The Court of Appeals of the State of Ohio
For The Sixth District, Lucas County, Ohio

JOHN W. KITCHEN,
964 Spitzer Building,
Toledo, Ohio
Attorney for Petitioner.

CUBBON AND RICE
300 Security Building
Toledo, Ohio,
Of Counsel.

THE FRANKLIN, TOLEDO

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To The Court of Appeals of the State of Ohio
For The Sixth District, Lucas County, Ohio

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Daniel H. Overmyer, prays that a writ of certiorari issue to review the decree of the Court of Appeals for the State of Ohio, Sixth District, Lucas County, Toledo, Ohio, in Case No. 5389 on the docket of said Court of Appeals filed on March 15, 1961, which decree affirmed the judgment and order of the Probate Court of Lucas County, Ohio, entered on November 17, 1960, (Case No. 81494).

OPINIONS BELOW

All orders, judgments and decrees of the courts below were rendered without opinion.

GROUNDS ON WHICH JURISDICTION IS ENVOKED

The date of the decree sought to be reviewed and the date of the entry thereof is March 15, 1961.

The decree of the Appellate Court was taken to the Supreme Court of the State of Ohio on a Motion to Certify which was denied by said Court on October 4, 1961. Thereafter an application for rehearing was denied by said Court on October 25, 1961.

The statutory provision believed to confer on this Court's jurisdiction to review the decree in question by writ

of certiorari is the United States Code, Title 28, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Petitioner contends that:

1. The spouse of the testator who elects to take under his Will may not thereafter be permitted to, by use of special statutes, take advantage of provisions which would defeat the intent of the testator and would be in essence holding against the Will.

2. The Probate Court was without jurisdiction to enter an order or judgment under *Ohio Revised Code Section* 2113.38 selling to the spouse of the testator, the deceased's "business."

STATEMENT OF THE CASE

On July 29, 1960, there was admitted to Probate in the Probate Court of Lucas County, Toledo, Ohio, a document purporting to be the Last Will and Testament of Harrison M. Overmyer, deceased. Petitioner denies that this is the Last Will and Testament of the late Harrison M. Overmyer and has instituted action to set this Will aside as such. This action is presently pending in the Common Pleas Court of Lucas County, Toledo, Ohio. The action or activity herein is not to be construed in any way as an admission by the petitioner that the document probated is the Last Will and Testament of Harrison M. Overmyer. Petitioner is forced to pursue his course in this cause of action to preserve the estate until final decision has been arrived at in all matters pertaining thereto. Cora Belle Overmyer, spouse of the deceased testator, and mother of the petitioner herein, elected to take under the aforesaid Will on November 9, 1960. Thereafter on October 21, 1960 and November 2, 1960, she filed in the Probate Court of Lucas County, Toledo, Ohio, applications to purchase certain "personal property" of the decedent in accordance with the *O.R.C. Section* 2113.38.

REASONS FOR ALLOWANCE OF WRIT

The Court of Appeals of Ohio for the Sixth District, Lucas County, Toledo, Ohio, has decided an important state question in a way in conflict with applicable state law. It has decided an important question in a way in conflict with decisions of this Court. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

To provide the background for this concept, we shall first explore the background in law for the making of a Will —

1. *Page on Wills* 62 (*Bowe-Parker Revision*), *Chapter 3. Source and Extent of Testamentary Power —Legislative and Judicial Control, Section* 3. *1. Nature of the Power to Make a Will.*

"The nature and extent of testamentary power in the United States must be considered at the outset in order for a person to appreciate its position in our law and understand the force and effect of the Wills statutes that form the basis of much of the discussion throughout this treatise.

According to the great weight of authority in the United States, the right to make a Will is in no sense a property right or a so-called natural right. It did not exist for realty at common law, nor at one time for more than a fraction of the testator's personalty. It is, therefore, not a right protected by any of the constitutional provisions whereby property is protected, which is sometimes expressed by saying that it is not a natural right; nor an inherent right; but it is purely a statutory right, subject to complete control of the legislature.

On the other hand, the Courts of Wisconsin have dissented sharply from this theory and have said that the power to make a Will is an inherent power and not a statutory power. They hold that the right to make a Will is secured by the constitution, and that the legislature can regulate succession by Will or descent in intestacy within reasonable limits, but that it cannot

impair such rights substantially or take them away entirely. Under this theory, *every person* of mature age and sound mind *has a right*, subject only to conformance to statutory regulations designed to safeguard such rights, *to make his own Will, and have it carried out according to his intent; and the constitutional right to make a Will includes the right to have a valid Will so given effect as to enforce the intention of the testator. In most of the cases in which this view has been expressed, the same result has been reached that would have been reached if the theory entertained by the majority of the courts had been adopted.*

The theory sometimes expressed that testamentary power is an incident of ownership of property, but that it is subject to statutory restrictions, is really another way of stating the majority view or at least a recognition of it, rather than an independent or compromise view. However, even a mere legislative right, as distinguished from a constitutional right, if it exists long enough, sometimes becomes so entrenched that it gains a sanctity which it did not have originally. Although the long-continued enjoyment of the power of testation has not caused a decrease in the number of states accepting the majority view, it has caused at least one of the majority states to take the position that since the right to make a Will has existed so long, a statute which restricts it will be strictly construed.

As between the jurisdiction and authority of the Federal Government and that of the states, it is clearly the states that have jurisdiction to regulate and control the right of inheritance and power of testation. The Federal Government, of course, is not entirely excluded from the picture, for its death tax laws (estate taxes) have a very strong, though indirect, effect upon the actual use to which the power of testation is put. Though a testator can within the limits of federal tax statutes make provisions that guard against payment of more taxes than necessary, he cannot by the terms of his Will declare to be untaxable that which is otherwise taxable." (emphasis ours)

The statement ". . . the same result has been reached that would have been reached if the theory entertained by

the majority of the courts have been adopted," is most cogent. Succinctly, this means that whatever theory is pursued, the testator has a "vested right" in having the intention of his Will carried out.

Now, Ohio is one of the states which holds to the majority rule, but so is the State of Virginia. In a case almost one hundred fifty (150) years old, this Court set forth the above stated precedent in interpreting the law of Virginia.

Herbert et al vs. Wren et al, 7 Cranch. 370 (February 15, 1813), page 377

"The first question to be discussed is this: Is the plaintiff, Susanna, entitled both to dower and to the provision made for her in the Will of her late husband? The law of Virginia has been construed to authorize an averment that the provision in the Will is made in lieu of dower, and to support that averment by matter dehors the Will. But, with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the Will itself, the act of the Virginia legislature is not understood in any respects to vary the previously existing common law.

In the English books there are to be found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision and relinquish her dower. There are other cases in which she has been permitted to hold both. The principle upon which these cases go appears to be this:

It is a maximum in a Court of equity not to permit the same person to hold under and against a Will. If therefore it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must renounce either her dower, or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest

to his wife as additional to her dower, then she may hold both.

The cases of *Arnold vs. Kempstead* and wife, of Villaracl and lord Galway, and of *Jones vs. Collier* and others, reported by Ambler, are all cases in which, upon the principle that has been stated, the widow was put to her election.

In the case under consideration neither party derives any aid from extrinsic circumstances, and therefore the case must depend on the will itself.

The value of the provision made for the wife compared with the whole estate is not in proof, but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify.

The only fund for the maintenance and education of his five children is the rent of 140 pounds per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower.

That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill and not receiving from the sons of the testator their half of its value, to hold the premises until the rent should discharge that debt, indicates an intention that in such case the whole rent should be retained.

The clause, too, directing the residue of his estate to be sold for the payment of debts is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the encumbrance of dower.

Upon this view of the will, it is the opinion of the majority of the Court that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both." (emphasis ours)

Somewhat of the background of the deceased's will making is enlightening although not essential to the determination herein. The present will which was purportedly executed on November 15, 1954, was made within a month and a half after the testator had made a previous will on October 1, 1954. The explanation for this was that the present will was made to take advantage of the "marital deduction" clause in the Federal Tax Statutes. It has been claimed that the previous Will of October 1, 1954, did not take advantage of this "marital deduction." How ever that may be, both of these wills clearly indicate the intent of the testator. That intent was to provide for his wife after his death during her lifetime so that she would have ample means of support, but still could not dissipate the whole estate, but rather that a goodly portion thereof would remain for the benefit of the petitioner herein. This is clearly evidenced by paragraph 7 in Item Second. This paragraph shows that if testator's spouse elected not to take under his Will that all he wanted her to have was her statutory rights and that the remainder be left in trust for the petitioner herein. The complete Will embodies this concept over and over again as did the previous Will which was purportedly executed on October 1, 1954. It is plain that the testator had set up in the Will trusts which he felt would provide for his wife during her lifetime in the same fashion as he provided for her during his lifetime, an ample income which would at the same time protect his estate with the minimum amount of involvement on the part of his wife. During the period of testator's lifetime, his spouse led a "sheltered existence" to the extent that he did not even permit her to have a personal checking account. At the same time, she was fully provided with all of the necessities and enjoyments of life without the attendant worries and complications thereof. It is clearly evident that the very strongly expressed intent of testator was to provide a continuance of this method of existence for his wife. It is more that readily evident that testator did not intend that his

wife should obtain control of his business to the detriment of a trust that he had set up in his will. During the approximate fifteen (15) months since the demise of the testator, the executor of the estate has operated this business at a profit of approximately One Thousand Dollars ($1,000.00) per month for a total in excess of Fifteen Thousand Dollars ($15,000.00). This business is to be sold to the spouse under the aforesaid statute for an "appraised" value of Six Thousand Five Hundred Dollars ($6,500.00). Had she been permitted to purchase the business at the time of the order of the Probate Court, the estate would have lost close to Ten Thousand Dollars ($10,000.00). The eventual loss is beyond the scope of present contemplation or computation.

The other items contained in the application which was granted by the Probate Court are negligible in comparison to the sale of the business. However, they are not negligible in the sense that they embody the same concept that is being set forth herein, that is the destruction of the intent of the testator by the use of this special statute. The one other major item which was permitted under the application by the Probate Court was a considerable quantity of liquor whose "appraised" value was also in the area of the ridiculous. Extrinsic testimony has revealed that this liquor was used by the testator in his business and could therefore be considered as part and parcel thereof, rather than any personal property of his own. It is plainly evident by reference to Item Second, paragraph 1 that the testator considered that he had disposed of all of his personal property therein.

Now for further contemplation of *O.R.C. Sec.* 2113.38. It is plainly a special statute. Its intent is clear. It was meant to provide the surviving spouse with the right to obtain certain items from the estate under a preference by remunerating the estate therefore, through purchase from said estate, if the purchase would not do violence to the intent of the testator. This is recognized in the statute by

the statement at the very beginning ". . . if not specifically devised or bequeathed." This could better have been stated by saying that if such purchase did not destroy the intent of the testator.

The Supreme Court of Ohio has consistently and even obtusely held with strict construction of special statutes. The most recent of these, *Starr vs. Young, Admr.* 172 O.S. 317 and *Parker vs. Young, Admr.* 172 O.S. 464 deal with special statutes in the field of Workmen's Compensation. The reasoning for the holdings in these particular cases was derived from previous holdings by the Supreme Court of the State of Ohio in entirely unrelated fields. The basic concept is that strict construction will be given to special statutes in the State of Ohio. In construing the concept of a "specific legacy," the Supreme Court of Ohio has in at least one case, *In Re Mellott*, 162 O.S. 113, 54 O. Op. 121, N.E. 2d 7, given it the meaning which the petitioner herein says should be accorded, that is the intent of the testator as demonstrated in his Will. In that case, the Ohio Supreme Court interpreted a residuary bequest as specific in nature. This Court made the same interpretation in the *Wren case, supra.* In the case at bar, the testator's intent is more clearly expressed than in either of these two cases cited above. In Item Third of the Probated Will, he gave to his spouse under Trust A *a sum equal to one-half* of the adjusted gross estate. In Item Fourth, it was stated "all the rest, residue and remainder of my estate of whatever nature and wherever situated, I give, devise and bequeath to my trustees hereinafter named, *but in trust nevertheless, to hold, manage, invest and reinvest the same as trustee hereunder.*" (emphasis ours) After compliance with the prior provisions of the will there would remain in the estate little more than the stocks and bonds and the business of the testator. These were the items that the testator placed in trust to be held, managed and invested and reinvested.

While the *Wren case, supra*, dealt with the concept of dower which was a common law rather than statutory and

this case deals with a special statute, the idea is nevertheless the same. In the *Wren case, supra*, this Court said "the testator appears to have considered himself at liberty to arrange his property without any regard to encumbrance of dower." By the same token herein, testator clearly indicated that he considered the provisions made for his spouse as distinct and ample and that the residue left as trust B in Item Fourth would be free of any right to be exercised by his spouse.

In Page's Ohio Revised Code Annotated under the aforesaid *O.R.C. Sec.* 2113.38 at page 301, there is cited "comparative legislation." Several other state statutes are thereunder cited. The first one of these is Indiana, a neighboring sister state of Ohio. Therein is reference to *Section* 6-402 *of the* 1953 *Replacement of Burns Indiana Statutes*. Consulting this statute, it is noted that it pertains to a widow's allowance. In one annotation thereunder at page 107, of Volume 3 of Burns Indiana Statutes Annotated, the following is set forth:

> ". . . In order to prevent a widow from taking under a will and also claiming the personalty given her by a statute, it must appear that the *assertion by her of both claims will defeat the intention of the testator. Shipman vs. Keys*, 217 Ind. 353, 26 N.E. 896; *Board vs. Board*, 163 Ind. 307, 71 N.E. 891; *Snodgrass vs. Meeks*, 12 App. 70, 38 N.E. 833; *Pierce vs. Pierce*, 21 App. 184, 51 N.E. 954; *Whisnand vs. Fee*, 21 App. 270, 52 N.E. 229; *Whetsell vs. Louden*, 25 App. 257, 57 N.E. 952."

and under another annotation at page 108:

> "If a testator makes provision in his will for his widow, which is more beneficial to her than the share of his estate given her by law, and she elects to take under the will, she cannot claim the $500.00 of personalty given her by statute, when to allow her to do so would defeat the evident intention of the testator. *Manning vs. Wilson*, 52 App. 1, 100 N.E. 106; *Stiglitz vs. Migatz*, 61 App. 529, 109 N.E. 809."

Petitioner will not burden this Court further with attempting to consider like legislation in other states. It has already been pointed out that this Court has distinctly held in the *Wren case, supra*, the very same idea set out in the Indiana Cases above and that the Ohio Supreme Court in the *Mellott case, supra*, also recognized this principle. Nor will petitioner attempt at the present time to set forth in detail the concept of "vested rights" either on behalf of the testator whose intent becomes such nor its application to others such as petitioner herein who have such "vested rights" in estates. It is sufficient that the *Wren case, supra*, sets forth that this Court found one hundred fifty (150) years ago that neither legislatures nor courts can do violence to the intent of the testator, even to benefit the surviving spouse, where the spouse has been amply provided for.

Although it is not easy to make accurate determination of legislative intent in Ohio since there apparently exists no direct reports on such, it is nevertheless, believed that the following may throw light on this particular intent as to this statute which was set forth by a committee in *22 Ohio Bar Association Report* 367 (*No.* 24), September 19, 1949:

> "Our committee discovered that, under the present section, surviving spouses have had the opportunity to and have taken advantage of the provisions of the section, *which has resulted in unfairness to others interested in the state. For example, they have purchased stock in close corporation, jewelry and other personal property both tangible and intangible, at inadequate and unfair prices.*" (emphasis ours)

It is believed that the present statute was derived from the activity of this particular committee and that the changes made therein from the previous statutes were attempts to stop the unfairness as the committee found them at that time. This is not to say that they saw all unfairness nor that they were able to prevent all of it by this change.

This is evident, or should be, from this particular case, since the purchase of a business for Six Thousand Five Hundred Dollars ($6,500.00) that has made a profit of Fifteen Thousand Dollars ($15,00.00) in the last fifteen (15) months borders on the edge of "robbery" to the estate and particularly Trust B of the Will. That all of the Ohio Courts have chosen to ignore this, is not necessarily indicative of anything insofar as its legalty is concerned. This Court can well recognize this fact by recent experiences with State Courts in other fields which deal with questions of greater public prominence. In the case at bar, this Court has before it an opportunity to set a necessary present day precedent in this highly important field of testacy.

The foregoing discussion has emphasized the purchase of the business because that is the predominent item that the testator intended to be transferred to the trustee for purpose of Trust B. The other items are negligible insofar as the value thereof is concerned, but they are not negligible in the sense that there has been the same abuse of disposition to the detriment of the estate as there was with the larger item of the business. The next larger item was a cache of liquor which testimony has revealed was considered to be part of the business by the deceased. It was kept in his business warehouse and was purportedly used by him in the promotion of "good will" for his business, particularly during the holiday season. This item, therefore, even though named separately by the spouse for the purpose of purchase should be included in the business and considered as part of the intention of the testator to go along with said business for the operation of the business in the same fashion that he had done for many years. All other items are negligible and can be disregarded.

Now as to the second question concerning the validity of the order and judgment of the Probate Court regarding the sale of the business to the spouse under *O.R.C. Sec.* 2113.38. Previously herein, the statute has been discussed

and it has been pointed out that it is a special statute. It was also pointed out that the Ohio Supreme Court has consistently held that special statutes are to be strictly construed. A similar strict construction has been accorded this statute in *Palmer vs. Smith*, 28 O.L. Abs. 673 (March 27, 1939 C.A. 8th Dist. Cuyahoga County) relating to the time for filing the application.

The petitioner contends that this statute nowhere provides for the sale thereunder of a business as has been done in this case. Under this statute, paragraph (A) provides for the selling of the mansion house including certain definite items therewith. (B) provides for the selling of securities in a certain fashion. (C) provides for the sale of "any other real or personal property of the decedent . . ." It was under this latter section that the spouse made application to purchase the business of the decedent as his "personal property." Now the Supreme Court of Ohio has twice held that a "business is not property." See *The Cin. Gas Light and Coke Co. vs. The State of Ohio* (1868), 18 O.S. 238 and *The Western Union Telegraph Co. vs. E. J. Meyer, Treasurer of Hamilton Co.* (1876), 28 O.S. 521.

Both of these cases dealt with taxation upon businesses and it was held that business was not property and therefore not subject to the same constitutional control insofar as taxation was concerned. In the first case, it was said at page 243: "*. . . but the charge or assessment here complained of is not a tax on property, but rather a charge upon . . . the business or which they are engaged; . . .*" (emphasis ours) This same concept was expressed at page 536 of *Western Union case, supra.* As previously stated, these cases dealt with taxation in a very similar concept which permits the taxation upon inheritances, called "excise taxes" rather than taxes upon property. The same concept must apply here, too, for in special statutes providing for the disposition of real or personal property in the fashion that is provided for in *O.R.C. Sec.* 2113.38 (C)

a business cannot be included as personal property. Because of its very nature, it is not included as property for the purpose of taxation and by the same reasoning, it cannot be included in a statute such as this for sale as personal property.

In *Wells Fargo & Co. vs. Jersey City* (1913), 207 Fed. 871, affirmed in (1915) 133 C.C.A. 371, 219 Fed. 699, (Writ of Certiorari denied in 1916) 239 U.S. 650, it was held in the construction of a statute that "... it is the essence of accepted canons of interpretation of legislative declarations that such a burden can only be imposed by clear and unequivocal language, leaving no doubt that such was a legislative purpose." In this case it was held that "business" was not "property" within the contemplation of the statute there being considered which would have placed a burden of compensation upon the city. In like fashion in a special statute, such as *O.R.C. Sec.* 2113.38, there must be a clear showing that an item such as business was within the contemplation of the legislature in its provisions in the statute. This cannot be done by a blanket paragraph such as (C) which provides only for all "real and personal property of the deceased." The case at bar is an excellent example of why this must be so, for here we have an item which the testator has clearly expressed as being included in a certain trust to be sold to a spouse who was adequately provided for in the fashion he desired at a ridiculously low sum of Six Thousand Five Hundred Dollars ($6,500.00) when it has earned an amount of over Fifteen Thousand Dollars ($15,000.00) in approximately fifteen (15) months. It is noted that provision (B) of the aforesaid statute makes specific provisions for the sale of securities to avoid the unfairnesses referred to in an earlier part of this argument as found by the 1949 committee for the Ohio Bar Association. It is readily evident that sale to a spouse of a business under this particular section is an absurdity for unless there is specific provision for such a sale as is provided for in paragraph (B) for securities there is basis for

the grossest of abuses, such as the one being here perpetrated.

Since a "business" is not "property" and since the legislature has not by clear and unequivocal language shown its intent of including a business in the aforesaid statute, the Probate Court in its order and judgment allowing the sale of the business to the spouse under this statute exceeded its jurisdiction and the judgment and order providing for the sale of such business to said spouse is illegal and void ab initio.

31 *O. Jur. 2d* 512, *Judgments, Section 22, Jurisdiction as to Particular Type Action or Judgment.*

> "Although the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it may still be *limited as to the type of proceedings or actions over which it has jurisdiction, and as to the extent and character of its judgments. A judgment may be void and void by reason of being beyond the power and authority of the court to render it. Thus, where a statute has prescribed the mode and particular limits in which jurisdiction to render a particular kind of judgment may be exercised it must be confined to the limits thus prescribed, and cannot be exercised in any other manner, nor upon any other terms.*" (emphasis ours)

As previously set forth herein, the plain and simple intention of this special statute is evident. It is for the purpose of enabling the surviving spouse to have preferential treatment in the purchase of certain articles from the estate which would be of more benefit to said spouse than to other persons. However, said purchase is to be made in a fashion that would not be detrimental to the estate and certainly not contrary to the intent of the testator. To permit a business to be considered personal property for sale under this section would be to defeat the very purpose of the statute and impose upon the estate and other persons interested

therein a burden and cause unfairnesses of the type described above in the Bar association report. To permit such interpretation would be doing violence to the intent of the legislature in the enactment of this special statute. It must be construed strictly and if a business is to be included, it must be done so in direct fashion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals for the 6th District, State of Ohio, should be granted.

JOHN W. KITCHEN,
Attorney for Petitioner.

CUBBON AND RICE
300 Security Building
Toledo, Ohio.
Of Counsel.

APPENDIX

DECREE SOUGHT TO BE REVIEWED, C.A. =5399

(March 15, 1961)

This cause came on for hearing upon the Assignments of Error, the Transcript, Stipulation of Counsel, and the Original Papers and Pleadings from the Probate Court of Lucas County, and on the Briefs and was argued by Counsel and submitted to the Court.

On consideration thereof the Court finds that there is no error prejudicial to the Appellant apparent on the record in said proceedings and judgment of the Court below.

It is therefore Considered and Adjudged by the Court that the Order of the Probate Court of Lucas County, Ohio, authorizing the sale and transfer of certain personal property at the appraised value to Cora Belle Overmyer, surviving spouse of the decedent, be and the same hereby is affirmed and this said cause is remanded to the Probate Court of Lucas County, Ohio, for further proceedings incident to the Administration of the Estate. Appellant is to pay full costs herein.

PORTION OF PROBATED WILL, P.C. =81191

(July 29, 1960)

ITEM SECOND

I give and bequeath to the persons below named the sum of money and the items of personal property set opposite their respective names, to be theirs absolutely and forever:

1. To my wife, CORA-BELLE OVERMYER, if she be living at the time of my decease, the sum of Ten Thousand Dollars ($10,000.00) in cash, and any automobile or automobiles I may own at the time of my decease, and all of my books, jewelry, wearing apparel, keepsakes and personal

effects, except cameras and fishing and hunting equipment, to be hers absolutely and forever. If she shall have predeceased me then I give and bequeath all of said items of personal property other than money to my son, DANIEL H. OVERMYER.

All household goods, furniture and furnishings, television and radio sets, musical instruments, air conditioners, household appliances and any and all other articles used in and about my residence, have always been her property.

Also to my wife above named, I devise the building or buildings and the real estate on which they are located which constitute my home at the time of my death, and also the real property owned by me in Bedford Township, Monroe County, Michigan.

2. To my son, DANIEL H. OVERMYER, the sum of Five Thousand Dollars ($5,000.00) in cash, and all of my cameras, hunting and fishing equipment.

3. If my wife, CORA BELLE OVERMYER, shall elect not to take under this Will, I authorize, empower and direct my Executor hereinafter named, to pay over and distribute to her the portion to which she may be entitled under the laws of the State of Ohio, including the provisions of Item Second hereof, less the Ten Thousand Dollars ($10,000.00) bequest, and to pay over the balance of my estate to THE NATIONAL BANK OF TOLEDO, as Trustee, to be held and managed by it for the benefit of my son, DANIEL H. OVERMYER, in accordance with the provisions of Paragraph 4 of Item Third of this Will.

ITEM THIRD.

If my said wife, CORA BELLE OVERMYER, shall survive me, then I give and bequeath to my Trustees hereafter named as a separate and distinct trust, *to be known as Trust "A," a sum equal to one-half of the value of my "adjusted gross estate"* as presently defined in the Fed-

Revenue Act of 1948, said amount, *however, to be reduced by the value* as finally determined for Federal estate tax purposes *of all other items of my gross estate qualifying for marital deduction under said Revenue Act which pass or have passed to my said wife outright under other provisions of this my Will, or outside of this Will by operation of law, or otherwise,* and the Trustees shall pay the entire net income from said trust fund to my said wife during her lifetime, at least as often as quarterly, and shall pay to or for her benefit such amount or amounts of principal as the corporate trustee may from time to time deem necessary or advisable for her comfort, maintenance and support, and upon her death shall pay the entire principal of said trust estate as it may then exist to or for such person or persons as my said wife may by her last Will direct and appoint, including the right to appoint to her own estate, and in default of any such appointment the same shall be added to and consolidated with the trust fund set up in the following paragraph hereof and held, managed, administered and distributed as an integral part thereof.

ITEM FOURTH.

All the rest, residue and remainder of my estate, of whatever nature and wherever situated, *I give,* devise and bequeath *to my Trustees* hereinafter named, *but in trust nevertheless to hold, manage, invest and reinvest the same as Trust B hereunder.*

The Trustees may, in their discretion, but shall not be compelled to, pay or advance out of Trust B to the Executor or Administrator of my estate sufficient funds to pay all or any part of the debts and obligations of mine (whether secured or unsecured), costs, charges and expenses of administration, and State and Federal inheritance, estate and transfer taxes assessable on account of the passing or transfer of any interest of my estate, either as part of my estate or under this agreement or otherwise.

My Trustee shall pay the net income from Trust B to or for my said wife, CORA BELLE OVERMYER, during her lifetime, and also pay to or for her benefit such amount or amounts of the principal thereof as the corporate Trustee may from time to time in its sole discretion deem necessary or advisable for her comfort, maintenance, support or for the comfort, maintenance, support or education of any child or other issue of mine.

Upon the death of my wife, or if she elects not to take under my Will, or if she shall have predeceased me then upon my death, I direct my corporate Trustee to retain the balance remaining in said Trust Estate in its hands for the benefit of my son, Daniel, during the remainder of his natural life.

I direct my Trustee to pay to him, or to expend for his use and benefit, in monthly or other convenient installments, the entire net income arising from my Trust Estate, and to make advancements to him from time to time out of the principal. I suggest that my Trustee be liberal with him, and if it sees fit during his lifetime it may pay over to him the major portion of the Trust Estate held for his benefit. I leave this matter of advancements to my son to the sole and uncontrolled discretion of my Trustee.

AMENDED APPLICATION — TO PURCHASE PERSONAL PROPERTY — P.C. =81494

(November 2, 1960)

Now comes CORA BELLE OVERMYER and represents to the Court that she is the surviving spouse of HARRISON M. OVERMYER, Deceased; that the Inventory and Appraisement of the Estate of the decedent heretofore filed herein includes the following described personal property which was not specifically bequeathed:

1) Net value of Business of HARRISON M. OVERMYER, doing business as MERCHANTS & MANUFACTURERS WAREHOUSE CO., 15-29 South Ontario Street, Toledo, Ohio	$6,545.00
2) All Canadian Spirtuous Liquors, consisting of 79 fifths.	79.00
3) Chevias Regal Blend Scotch, consisting of 132 fifths.	132.00
4) 288 Minatures, Chevias Regal Blend Scotch, @ 50c ea.	144.00
5) On Lot miscellaneous cigars, canned vegetables, maple syrup, etc.	50.00
	$6,950.00

Your applicant does hereby elect to purchase said personal property hereinabove described at the appraised value as fixed by the Appraisers, and represents to the Court that this election is being made within one month after the approval of the Inventory and Appraisement of said estate, on October 13, 1960.

WHEREFORE, your applicant prays the Court for an order approving the said election and ordering The National Bank of Toledo, Executor, to transfer and convey said property to her upon compliance with the terms and conditions as may be fixed by the Court.

PART OF SCHEDULE A OF INVENTORY AND APPRAISEMENT, P.C. =81194

(October 13, 1960)

Harrison M. Overmyer, d b a Merchants and Manufacturers Warehouse, 15-29 South Ontario Street, Toldo, Ohio

NET VALUE OF BUSINESS

Composed of The Following:

Cash	$ 1,705.32
Accounts Receivable	13,118.00
Prepaid Expenses	3,585.84
Total Current Assets	$18,409.16

Warehouse Equipment:

Clark Fork Lift #CEC-119-LC	900.00
Clark Fork Lift #DCL-46-PT	875.00
Clark Fork Lift #CE2-80-RK11	1,100.00
Clark Fork Lift #CEC-1320-LM	900.00
Clark Fork Lift #CE-676-PO	550.00
Tow Motor #3550330	400.00
Tow Motor #W-4925	200.00
C.E. Battery Charger #JNC1-36F-15)	
Industrial Cleaner Model 184-A2)	
Toledo Dial Scale)	
Electric Spray Machine)	500.00
2 Oasis Drinking Fountains)	
Miscellaneous Lot Floor Trucks:)	
Hand Trucks, Pallets; Pallet)	
Roll s; Roller Conveyors)	
Total Warehouse Equipment	$ 5,425.00

Automobile Trucks:

1953 Ford Service #C60R3H 28721	$ 345.00
1954 Ford Service #C60Z4H 46079	545.00
1955 Ford Service #C6PZ5H 40351	950.00
1957 Ford Service #C60L7U 41397	1,545.00
Total Trucks	$3,385.00

Office Furniture and Fixtures:

Paymaster Check Writer #700-5018371	5.00
Barrett Adding Machine #28098-B19E	20.00
IBM Electric Typewriter #14008936	110.00
IBM Electric Typewriter #157126	25.00
IBM Electric Typewriter #1172369	250.00
International Typewriter #131-114266	25.00

IBM Electric Typewriter #122-1139185DD	25.00
Woodstock Typewriter #8J251236	10.00
Woodstock Typewriter = X860692	20.00
Victor Adding Machine #964372C	50.00
Frigidaire Refrigerator	25.00
Westinghouse Stove	25.00
Miscellaneous Lot Desks Chairs: Filing Cabinets: Electric Fans - Supplies	710.00
Total Office Furniture	$1,300.00
TOTAL ASSETS $28,519.46	

LIABILITIES

Accounts Payable	$5,309.39
Employees Tax Withheld	1,888.66
Reserve Damage Claims	2,530.00
Taxes Accrued	4,445.83
Insurance	586.70
Deferred Handling Income	7,152.59
TOTAL LIABILITIES $21,973.17	
Net Value of Business at set forth above	$6,545.29

JOURNAL ENTRY AUTHORIZING THE TRANSFER OF PERSONAL PROPERTY P.C. =81494

(November 17, 1960)

This cause came on for hearing on November 9, 1960, upon the Amended Application and election of Cora Belle Overmyer, surviving spouse of Harrison M. Overmyer, deceased, to purchase certain personal property at the appraised value as fixed by the appraisers. Daniel H. Overmyer, Cora Belle Overmyer, and The National Bank of Toledo, Executor of the Estate of Harrison M. Overmyer, deceased, all being present in open court and represented by their respective counsel.

The cause was heard on the evidence, including the testimony of expert witnesses as to the valuation of the Personal Property described in the Amended Application of Cora Belle Overmyer, and was submitted to the Court.

On consideration thereof, the court finds that pursuant to the former order of this court the parties were duly served with a copy of the Amended Application and Notice of the time and place of hearing, and that the interval between the service of notice and the time of the hearing is reasonable; that the said Amended Application and all the necessary parties are properly before this court.

The court further finds that the Inventory and Appraisement of this estate was heretofore approved by this court on October 13, 1960, and that the election by the widow has been made within one month after the approval of said Inventory and Appraisement and that the widow has duly elected to purchase certain personal property and her Amended Application and election is hereby approved. The court further finds that the appraisement was properly made by the appraisers and that the appraised price of the property selected is adequate and that a sale to the widow of the decedent would prejudice the rights of Daniel H. Overmyer or any other parties in interest.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the said Cora Belle Overmyer, as widow of the decedent, Harrison M. Overmyer, having duly elected to purchase certain personal property, The National Bank of Toledo, Executor of the Estate of Harrison M. Overmyer, deceased, be, and hereby is authorized and directed to transfer and convey to the said Cora Belle Overmyer, for cash, the following personal property for the appraised value thereof:

1) Net value of Business of Harrison M. Overmyer, doing business Merchants & Manufacturers Warehouse Co., 1519 South Ontario Street, Toledo, Ohio	$6,547.00

2) All Canadian Spirituous Liquors, consisting of 79 Fifths	79.00
3) Chevias Regal Blend Scotch, consisting of 132 Fifths	132.00
4) 288 Miniatures, Chevias Regal Blend Scotch, @ 50c ea.	144.00
5) One Lot miscellaneous cigars, canned vegetables, maple syrup, etc.	50.00
	$6,950.99

IT IS FURTHER ORDERED that the said The National Bank of Toledo as Executor execute and deliver the necessary Bills of Sale, Assignments and any documents that may be required to completely transfer the said property. The National Bank of Toledo is authorized to assign and transfer to Cora Belle Overmyer, Certificates of Title evidencing ownership of the following described motor vehicles, which vehicles are a part of the assets of the decedent's business:

1953 Ford Truck, Serial No. C60R3H 28721
1954 Ford Truck, Serial No. C60Z4H 46079
1955 Ford Truck, Serial No. C61Z5H 40351
1957 Ford Truck, Serial No. C60L7U 41397

PART OF APPLICATION BY EXECUTOR TO EXTEND TIME TO FILE INVENTORY: P.C. =81494

(August 29, 1960)

. . . *Your executor represents that said estate consists of a going business and a large amount of real and personal property* and that additional time is required to make and return the inventory and appraisement . . .

OHIO REVISED CODE SECTION 2113.38 — SURVIVING SPOUSE MAY PURCHASE PROPERTY (In Part)

A surviving spouse, even though acting as executor or administrator, may purchase the following property, if left by the decedent and if not specifically devised or bequeathed:

(A) The mansion house, including the parcel of land on which such house is situated and lots or farm land adjacent thereto and used in conjunction therewith as the home of the decedent, and the household goods contained therein, at the appraised value as fixed by the appraisers;

(B) Securities listed on an approved stock exchange, as defined in division (E) of section 1707.02 of the Revised Code, at the market price at the time of purchase;

(C) Any other real or personal property of the decedent not exceeding, with the mansion house and land used in conjunction therewith and such household goods as the spouse elects to purchase, one third of the gross appraised value of the estate, at the appraised value as fixed by the appraisers.